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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA THOMAS PARRISH, Defendant and Appellant.	C087461 (Super. Ct. No. 15F01261)

Defendant Joshua Thomas Parrish appeals from his conviction of attempted murder, attempted robbery, and personal use and discharge of a firearm. He contends insufficient evidence supported the jury's finding that he committed attempted murder, and that the trial court erred in failing to instruct the jury that his codefendant's fiancée was an accomplice as a matter of law. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Gustavo H. (Gustavo) grew marijuana, and he would sometimes trade, sell, or give away marijuana to others. Codefendant Adam Villa occasionally came to Gustavo's house to smoke or purchase marijuana; he typically came alone.

One evening, Villa called Gustavo and said he needed to come by to obtain some marijuana. Gustavo's friend Enrique M. (Enrique) was staying with Gustavo at the time. Villa arrived approximately 20 minutes later with two other men wearing hooded sweatshirts that obscured their faces. All three men were armed, and Villa pointed a gun at Gustavo's face. Gustavo grabbed the gun, and he and Villa fought over it. A melee ensued.

Gustavo and Enrique testified at trial, giving differing versions of the subsequent events.

Gustavo H.'s Testimony

While Gustavo and Villa fought over Villa's gun, Villa first shot into the air, and then he shot Gustavo in the legs. One of the other men reached around Villa and shot Gustavo in the stomach. Villa and the two men forced their way into the house, and Gustavo heard another five to 10 shots fired as he fought against the men. Gustavo was shot four times in his legs.

Gustavo fell to the ground momentarily, and the men surrounded Enrique and pistol whipped him on the floor. Gustavo got up and began fighting with them again. The men shot at Gustavo, grazing him on one leg and his stomach. Gustavo testified both defendant and codefendant Frank Camacho shot at him.

Eventually, Gustavo chased defendant and Camacho out the front door. Villa, who was behind Gustavo, shot Gustavo in the buttocks. The men jumped into a car parked outside and drove away.

Gustavo told police he could not identify the men with Villa, he was unable to identify Camacho or defendant in a photo lineup, and he did not identify defendant or

Camacho at the preliminary hearing. Gustavo testified at trial he did not want to identify Camacho and defendant at the preliminary hearing because he was not sure if he was going to be granted immunity at that time. At trial, Gustavo initially testified he was unsure of the race of the men and testified he was "just vaguely" able to get a good look at them because of the hoodies they were wearing. But he identified defendant and Camacho as Villa's associates, and he remembered a tattoo on defendant's face.

Enrique M.'s Testimony

Enrique was in the living room but ran toward the door when he saw Gustavo fighting with Villa while trying to keep the other intruders out. As Villa tried to force his way through the door, a second man reached over Villa and shot Gustavo. Gustavo fell on a couch by the entryway. The second man shot Gustavo again. While Gustavo fought the second man, Enrique testified that Villa yelled out, "[K]eep calm. This is a robbery. . . . [E]verybody just chill out. We're here just to take shit." A third man, who had come through the door, shot Gustavo again while Gustavo was on the ground. The men then beat Enrique, and he fell to the ground and lost consciousness.

When Enrique regained consciousness, he saw the second man fighting with Gustavo in the yard, and the other two men running out of the house. The second man was shooting Gustavo again. The men then got in a car driven by a female and left.

Enrique identified Villa as the first man through the door, but he did not identify Camacho or defendant. Enrique testified the second man was African-American, and he could not identify the race of the third man.

Aline Villa's Testimony

Aline Dejesus Villa (Aline), codefendant Villa's wife (his fiancée at the time of the crimes), testified under a grant of immunity. Aline and Villa spent the day together before the incident, and they picked up Camacho and defendant before driving to Gustavo's house. She parked in the driveway. She had been to Gustavo's house before with Villa to smoke marijuana, and she thought that was the purpose of this visit. Aline

did not see any guns in the car, and she did not hear any talk about a robbery. Aline was tired, so she waited in the car while Villa, defendant, and Camacho went to the front door. She testified that she saw the men walk up to the front door together and enter the house without a struggle, and then she dozed off.

Aline later heard two gunshots fired outside the house. She saw Villa, defendant, Camacho, Gustavo, and one other man run out of the house; she did not see anybody else. She then saw Gustavo and defendant fighting outside the house. When Aline heard the shots and saw the fighting, she moved the car to the middle of the street. Villa, defendant, and Camacho got in the car. Aline did not see anyone with a firearm. The men in the car were quiet, mad, and upset, although Aline testified she was scared and did not look at them. She dropped defendant and Camacho off where she had picked them up, and then she drove Villa back to their house.

Trial

The jury found defendant guilty of attempted murder and attempted robbery while entering a structure and acting in concert. (Pen. Code, §§ 664/187, subd. (a), 664/211, & 213, subd. (a)(1)(A).)[1] As to both counts, the jury found defendant personally used a firearm and personally discharged a firearm. (§ 12022.53, subds. (b) & (c).) The jury found defendant did not inflict great bodily injury. (§ 12022.53, subd. (d).)

The trial court sentenced defendant to 27 years in prison: seven years for attempted murder and 20 years for personally and intentionally discharging a firearm in the commission of an attempted murder. The trial court imposed but stayed a sentence of six years for attempted robbery and 20 years for the associated firearm enhancement, pursuant to section 654.

Additional facts related to the jury instructions are set forth in the discussion.

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[1] Unspecified statutory references are to the Penal Code.

DISCUSSION

I

Sufficiency Of The Evidence

Defendant contends his conviction for attempted murder must be reversed because there was insufficient evidence to find him guilty. Defendant argues Gustavo and Enrique's testimony was conflicting and internally inconsistent, and it is "not enough to show that one of a group of men fired a shot that would support an attempted murder conviction." We disagree.

"In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

"An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161.) " 'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed.' [Citations.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-

1117.) " ' "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' [Citation.]" (*Chiu*, *supra*, at p. 161.) "Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*McCoy*, *supra*, at p. 1117.) "A nontarget offense is a ' "natural and probable consequence" ' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.]" (*Chiu*, *supra*, at p. 161.) "[A] number of California cases . . . hold murder or attempted murder can be a natural and probable consequence of robbery." (*People v. Cummins* (2005) 127 Cal.App.4th 667, 677.)

"A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 92; see, e.g., *People v. Diedrich* (1982) 31 Cal.3d 263, 280-283 [multiple acts of bribery; single bribery charge].) The trial court was required to—and did—instruct the jury that it needed to unanimously agree as to the criminal act committed. But the jury need not unanimously agree on whether defendant was an aider and abettor or a direct perpetrator of the offense, even where finding defendant guilty as an aider and abettor would require the jury to find a set of facts different from those required to find defendant guilty as a direct perpetrator. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1026.) "Sometimes, as probably occurred here, the jury simply cannot decide beyond a reasonable doubt exactly who did what. There may be a reasonable doubt that the defendant was the direct perpetrator, and a similar doubt that he was the aider and abettor, but no such doubt that he was one or the other." (*People v. Santamaria* (1994) 8 Cal.4th 903, 919 (*Santamaria*); see also *People v. Culuko* (2000) 78 Cal.App.4th 307, 323 [in a murder prosecution, the jury must find that *some* defendant harbored malice, but the jury did not have to find which defendant that was].)

Defendant argues he cannot be held liable for attempted murder where the evidence does not show which defendant actually shot Gustavo, but we disagree. There is substantial evidence each defendant was a direct perpetrator or an aider and abettor to the attempted robbery. Defendants were armed and entered Gustavo's house with the intent to rob him. Each defendant is equally liable for the attempted robbery as the target crime. And there is substantial evidence attempted murder is a natural and probable consequence of the attempted robbery. It is foreseeable Gustavo would resist the attempted robbery, and it is foreseeable one or more of the defendants would attempt to murder Gustavo when he resisted. Therefore, there is substantial evidence each defendant is liable for attempted murder as a natural and probable consequence of the attempted robbery.

We have no evidence suggesting the jury did not follow the court's instruction to unanimously agree as to the criminal act committed. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [jury presumed to have followed court's instructions].) And once the jury unanimously agreed as to the criminal act, it was not required to determine beyond a reasonable doubt which defendant physically fired the shot. As the court observed in *Santamaria*, while there may be doubt as to whether defendant was the direct perpetrator, and there may be doubt as to whether defendant was an aider and abettor to the attempted murder, there is no doubt he was one or the other. (*Santamaria*, *supra*, 8 Cal.4th at pp. 918-919.) It would be "absurd . . . to let the defendant go free because each individual juror had a reasonable doubt as to his exact role." (*Id.* at p. 920, fn. 8.) There is substantial evidence defendant committed attempted murder.

II

Aline Villa's Accomplice Liability

Defendant contends the trial court erred by failing to instruct the jury with CALCRIM No. 335, which would have instructed the jury that Aline was an accomplice to the crimes as a matter of law and that the jury could not convict defendant based on her

uncorroborated testimony. Instead, the trial court instructed the jury with CALCRIM No. 334, which first instructed the jury to determine whether Aline was an accomplice. If the jury found she was an accomplice, CALCRIM No. 334 instructed the jury to use her testimony only if her testimony was corroborated. If the jury found she was not an accomplice, CALCRIM No. 334 instructed the jury to consider her testimony as it would the testimony of any other witness. Defendant argues, "It is clear that a 'getaway driver' is an accomplice, that knowingly assisting a robber prior to his reaching a place of temporary safety makes the person doing so a principal, and the court's omission of accomplice instruction below was error." We disagree.

"When the evidence at trial would warrant the jury in concluding that a witness was an accomplice of the defendant in the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice. If the evidence establishes as a matter of law that the witness was an accomplice, the court must so instruct the jury, but whether a witness is an accomplice is a question of fact for the jury in all cases unless 'there is no dispute as to either the facts or the inferences to be drawn therefrom.' [Citation.]" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271 (*Hayes*).) "We review this claim, which involves the determination of applicable legal principles, under a de novo standard." (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

Defendant asserts Aline was an accomplice as a matter of law because she formed the intent to aid a robbery before defendants reached a place of temporary safety. Defendant contends Aline "clearly understood what [defendants] were doing before the crime was concluded." But while a getaway driver is an accomplice to robbery where she forms the intent to aid and abet the robbery before the asportation of the loot has ceased, the general rule is an aider and abettor must form the intent to aid, promote, encourage, or instigate commission of the crime before the crime has been completed. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164-1165.) Here, defendants were charged

with *attempted* robbery and *attempted* murder, both of which were completed crimes at least by the time Aline heard fighting. (See *People v. Ervine* (2009) 47 Cal.4th 745, 785 ["Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing"]; *People v. Lindberg* (2008) 45 Cal.4th 1, 24 [" 'An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission' "].) Therefore, Aline could only be held liable as an accomplice if she formed the intent to, and in fact aided, promoted, encouraged, or facilitated the commission of the crimes *before* the ineffectual acts toward the completion of robbery and murder. (See *Cooper, supra,* at p. 1164 ["It is legally and logically impossible to both form the requisite intent and in fact aid, promote, encourage, or facilitate commission of a crime after the commission of that crime has ended"].)

The trial court correctly ruled it was unable to conclude Aline was an accomplice as a matter of law. Aline testified she had no knowledge of defendants' intent to commit robbery or murder before arriving at the house; she believed defendants were going to Gustavo's house to smoke and purchase marijuana. She did not hear any discussion of a robbery, and she did not see that any of defendants were armed. When defendants went into Gustavo's house, she waited in the car because she was tired. By the time she heard fighting in front of the house, the crimes of attempted robbery and attempted murder had been completed. While a reasonable jury could have disbelieved Aline's testimony and found she formed the intent to aid and abet the crimes before they were completed, a reasonable jury could also have found Aline did not know anything about the intended crimes until well after the crimes were completed. Because the facts establishing Aline's status as an accomplice were a disputed jury question (*Hayes, supra,* 21 Cal.4th at p. 1271), the trial court did not commit instructional error.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

BLEASE, Acting P. J.

MAURO, J.